82-96

Office - Supreme Court, U.S.
FILED
JUL 12 1982
ALEXANDER
C.

No. .....
IN THE

Supreme Court of the United States

October Term, 1982

SINAI TEMPLE, a nonprofit religious corporation, WILLIAM FRIEDLAND, MILTON SIEGEL, DORIS SIEGEL, and MOUNT SINAI MEMORIAL PARK, a division of SINAI TEMPLE,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

HOWARD I. FRIEDMAN,
1600 One Wilshire Building,
Los Angeles, Calif. 90017,
(213) 629-0274,
Attorney for Petitioners.

MICHAEL BROURMAN,
ANN KOUGH and
LOEB AND LOEB;
LAWRENCE E. PRICE,
BONNIE LOUIS and
THOMAS AND PRICE,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

QUESTIONS PRESENTED.

1. May courts order discovery as to the hiring criteria for clergy of a religious body, its internal decisions concerning the performance of its clergy or its decision to terminate the employment of said clergy?

2. May the courts be used for settling internal grievances between parishioners and religious bodies?

TABLE OF CONTENTS

	Page
Opinion below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	3
Statement of the Case	3
A. The Proceedings in Respondent Court	3
B. The Proceedings in the California Court of Appeal and the California Supreme Court	6
Statement of Reasons for Granting the Writ of Certiorari	7
I.	
The Discovery Sought Is Barred by the First Amendment's Freedom of Religion Clause	7
II.	
The Judicial System May Not Be Used for the Purpose of Settling Internal Grievances Against Religious Bodies	12
III.	
Conclusion	12

Page

INDEX TO APPENDICES

Appendix A. Order filed Mar. 12, 1982 .... App. p. 1

Appendix B. Minute Order 2

Appendix C. First Amendment to the United States Constitution 4

Appendix D. Discovery Items To Which This Petition is Directed 5

Appendix E. Second Amended Complaint for Breach of Contract; Fraud; Negligence; Negligent Infliction of Emotional Distress; Intentional Infliction of Emotional Distress; Negligent Employment; Constructive Fraud; Breach of Fiduciary Duty 11

Appendix F. Answer to Second Amended Complaint 41

TABLE OF AUTHORITIES

Cases — Page

Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary, 485 F.Supp. 255 (N.D. Tex. 1980) 10, 11

Gonzalez v. Archbishop, 280 U.S. 1, 74 L.Ed. 131 (1929) 9, 10

Hammerstein v. Superior Court, 341 U.S. 491 (1951) 1

Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 97 L.Ed. 120 (1952) 9, 12

McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896, 34 L.Ed.2d 153 (1962) 11

Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 49 L.Ed.2d 151 (1976) 8, 10, 11, 12

Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974) 7, 10

Watson v. Jones, 13 Wall 679, 20 L.Ed. 666 (1872) 8, 9

Constitution

United States Constitution, First Amendment 2, 3, 5, 7, 8, 9, 11, 12

United States Constitution, Fourteenth Amendment ... 9

Statute

United States Code, Title 28, Sec. 1257(3) 2

No. .....

IN THE

Supreme Court of the United States

October Term, 1982

SINAI TEMPLE, a nonprofit religious corporation, WILLIAM FRIEDLAND, MILTON SIEGEL, DORIS SIEGEL, and MOUNT SINAI MEMORIAL PARK, a division of SINAI TEMPLE,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Petitioners, Sinai Temple *et al.*, hereby respectfully pray that a writ of certiorari issue to the Court of Appeal of the State of California, Second Appellate District, to review that court's denial of Petitioners' petition for a writ of mandate directed to Respondent Court. The Supreme Court of California denied a petition for hearing in said court.*

*The petition for certiorari is properly directed to the Court of Appeal where that court's decision is denied review by the California Supreme Court. [See *Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1951).]

OPINION BELOW.

The Court of Appeal opinion, ordered not for publication, is set forth in Appendix A hereto. The Supreme Court of California denied a Petition for Hearing and rendered no opinion. The Respondent Court, in its decision upon which the Petition for Writ of Mandate was based, rendered an unreported minute order which is set forth in Appendix B hereto.

JURISDICTION.

The decision of the Court of Appeal sought to be reviewed was filed March 12, 1982. A Petition for Hearing in the Supreme Court of California was filed on April 12, 1982. On May 20, 1982, that Court denied said Petition for Hearing with one justice voting in favor of granting a hearing.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1257(3).

This Court's review by certiorari is sought on the ground that the decision of the Court of Appeal has determined substantial questions of federal law arising under the Freedom of Religion Clause of the First Amendment to the United States Constitution in a way in conflict with applicable decisions of this Court.

QUESTIONS PRESENTED.

1. May courts order discovery as to the hiring criteria for clergy of a religious body, its internal decisions concerning the performance of its clergy or its decision to terminate the employment of said clergy?

2. May the courts be used for settling internal grievances between parishioners and religious bodies?

CONSTITUTIONAL PROVISION INVOLVED.

The Freedom of Religion Clause of the First Amendment to the United States Constitution. Printed in Appendix C hereto.

STATEMENT OF THE CASE.

A. The Proceedings in Respondent Court.

This Petition arises out of a discovery order directing disclosure of information concerning the hiring, supervision and termination of a rabbi by a Temple. Petitioner Sinai Temple, a nonprofit religious corporation, is a defendant in an action now pending in Respondent Court, entitled "*Dr. Marvin Smotrich v. Rabbi Hillel Silverman, etc.*", Case No. C352330. The defendants in that action also include, among others, Petitioner Mount Sinai Memorial Park, a division of Sinai Temple, and Petitioners William Friedland, Milton Siegel and Doris Siegel, who are alleged to be present or former officers or directors of Sinai Temple.[1] (Hereinafter Petitioners shall be collectively referred to as "SINAI TEMPLE".) Dr. Marvin Smotrich, the plaintiff in that action, which was filed on or about January 22, 1981, was named in the Petition below as Real Party in Interest ("Real Party").

On or about July 29, 1981, after Respondent Court had sustained Petitioners' demurrers to the original Complaint and a subsequent First Amended Complaint, Real Party filed and served his Second Amended Complaint in that action. In that Second Amended Complaint, Real Party alleges, *inter alia*, that he and his former wife were members of the

---

[1]In the pleadings filed below by Real Party, Petitioner Mount Sinai Memorial Park is improperly alleged to be a nonprofit corporation rather than a division of SINAI TEMPLE and Petitioner Milton Siegel is improperly alleged to have been an officer and director of SINAI TEMPLE although he has never held either office.

congregation of SINAI TEMPLE between 1977 and 1980, that during that period of time Rabbi Hillel Silverman, who was then the Rabbi of SINAI TEMPLE, provided marriage counseling to him and to his wife, and that, during the course of that marriage counseling, Rabbi Silverman had an extramarital affair with Real Party's wife.

In the Second Amended Complaint, Real Party asserted eight causes of action against all defendants: Breach of Contract, Fraud, Negligence, Negligent Infliction of Emotional Distress, Intentional Infliction of Emotional Distress, Negligent Employment, Constructive Fraud and Breach of Fiduciary Duty. On or about October 23, 1981, Respondent Court sustained SINAI TEMPLE's demurrer to all of those causes of action except the Third Cause of Action for Negligence and the Fourth Cause of Action for Negligent Infliction of Emotional Distress. On or about December 9, 1981, after Real Party failed to file a further amended complaint within the time specified by Respondent Court, SINAI TEMPLE filed its Answer to those two remaining causes of action.

In his Third Cause of Action, Real Party alleges, in substance, that SINAI TEMPLE, through Rabbi Silverman, provided marital counseling to congregation members and that SINAI TEMPLE was negligent in supervising the manner in which Rabbi Silverman purportedly provided marital counseling to him and to his wife. In the Fourth Cause of Action, Real Party alleges that he suffered humiliation and mental anguish as a result of the extramarital affair which Rabbi Silverman had with his wife during the course of that purported marital counseling.[2]

---

[2]In point of fact, SINAI TEMPLE denies that it even offered marriage counseling to its members and that Rabbi Silverman ever provided such a service as part of his duties.

From the time of the filing of the original Complaint below, Real Party has sought to engage in substantial discovery. In that effort, Real Party took the depositions of SINAI TEMPLE's custodian of records and Dr. Edward Kaminer, a member of its Board of Directors; served a First Set of Requests for Admissions and Interrogatories on SINAI TEMPLE; and served a Second Set of Interrogatories on SINAI TEMPLE. Timely objection was made by SINAI TEMPLE to much of that discovery on a number of grounds, including the fact that it would infringe upon SINAI TEMPLE's religious freedom in violation of the First Amendment of the United States Constitution.

On or about June 1, 1981, Real Party filed and served a motion to compel SINAI TEMPLE to respond to approximately 75 deposition questions, requests for admissions and interrogatories to which SINAI TEMPLE had objected.

On August 19, 1981, after Respondent Court had twice previously continued the hearing on Real Party's motion, it again continued that hearing and directed counsel for SINAI TEMPLE and Real Party to file a joint statement. On December 9, 1981, after two additional continuances, Respondent Court ruled on Real Party's motion and ordered SINAI TEMPLE to answer 29 of the items to which objections had been asserted within 45 days (on or before January 24, 1981).

On or about January 6, 1982 SINAI TEMPLE served its Supplementary Answers to Certain of Plaintiff's Requests for Admissions and First and Second Set of Interrogatories, wherein SINAI TEMPLE answered nine of those 29 items. The Petition for Writ of Mandate below was directed only to the remaining four deposition questions, seven requests for admissions and nine interrogatories. These questions are set forth in Appendix D hereto. The Second Amended Complaint is set forth in Appendix E; the Answer to the Second

Amended Complaint is set forth in Appendix F hereto. Generally these questions, requests for admissions and interrogatories covered the topics of the Board of Directors' dealings with Rabbi Silverman, the Board's discussions of his work and the ultimate termination of his employment.

B. The Proceedings in the California Court of Appeal and the California Supreme Court.

Petitioners timely filed a Petition for Writ of Mandate in the Second Appellate District of the California Court of Appeal. The Court of Appeal issued an Order to Show Cause and stayed Respondent Court's order. After hearing on the petition, the Court on March 12, 1982 denied said petition, discharged the alternative writ and ordered Petitioners to comply with Respondent Court's order within ten (10) days. [Appendix A.]

A timely petition for hearing in the California Supreme Court was filed on April 12, 1982. On April 16, 1982 the Supreme Court stayed the order of Respondent Court pending final determination of the petition. Said petition was denied on May 20, 1982 with Justice Frank Newman voting in favor of granting the hearing.

STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI.

The First Amendment to the United States Constitution strictly prohibits governmental interference in ecclesiastical matters. Historically this prohibition has encompassed both interference as to doctrinal issues and church administration. Both this Court and lower federal courts have dealt in some depth with this prohibition.

Respondent Court, by its order to comply with discovery, and the District Court of Appeal, by its denial of the petition below, have ignored this fundamental proposition. Both courts have implicitly held that decisions concerning the hiring of clergy and the subsequent supervision of that clergy are not protected under the Freedom of Religion Clause. Nothing could be closer to the core of the administration and operation of a religious body than questions as to its clergy. Review by way of certiorari is required in this Court for the transcendent reason that only such review can assure the fundamental right to worship without governmental intrusion.

I.

The Discovery Sought Is Barred by the First Amendment's Freedom of Religion Clause.

> "The First Amendment language that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .' historically has stood for the strict prohibition of governmental interference in ecclesiastical matters. Only on rare occasions where there existed a compelling governmental interest in the regulation of public health, safety, and general welfare have the courts ventured into this protected area. (Citations.)" [*Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974).]

Each of the twenty items to which this Petition is addressed attempts to probe *directly* into the facts surrounding the initial hiring of a rabbi by a congregational governing body, its subsequent supervision of his activities and his ultimate resignation from the congregation. No area of inquiry into the administration and operation of a religious body could be more fundamentally prohibited by the protections guaranteed by the First Amendment, as the relevant case law makes unequivocally clear.

Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 49 L.Ed.2d 151 (1976) involved the suspension and replacement of a bishop of the church. The Supreme Court of Illinois had ruled that the proceedings of the church with respect to the bishop were procedurally and substantially defective under the internal regulations of the church and therefore were arbitrary and invalid. This Court held that the lower court's inquiries into matters of ecclesiastical cognizance and policy and its actions pursuant thereto violated the First Amendment, stating:

> "For civil courts to analyze whether the ecclesiastical actions of a church are in that sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church adjudicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits . . ." *Id.* at 713, 49 L.Ed.2d at 165.

The Court went on to quote *Watson v. Jones*, 13 Wall 679, 20 L.Ed. 666 (1872) for its conclusion that religious controversies are not the proper subject of civil court inquiry.

> "But is a very different thing where a subject-matter of dispute, strictly, and purely ecclesiastical in its character, — a matter over which the civil courts exercise

> no jurisdiction, — a matter which concerns theological controversy, *church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,* — becomes the subject of its action." 13 Wall at 733, 20 L.Ed. 666 (emphasis supplied).

This Court concluded that the First and Fourteenth Amendments permit religious organizations to establish their own rules and regulations for internal discipline and government, which are not subject to review by the courts.

In *Kedroff v. Saint Nicholas Cathedral,* 344 U.S. 94, 97 L.Ed. 120 (1952) a dispute arose between two factions of the Russian Orthodox Church over title and control of a church building. This Court held that this issue was ecclesiastical and therefore not subject to review by the courts. The Court further stated that the freedom to select clergy was constitutionally protected. *Id.* at 116, 97 L.Ed. 136.

Gonzalez v. Archbishop, 280 U.S. 1, 74 L.Ed. 131 (1929) applied this principle of noninterference by the courts in a case involving a dispute over entitlement to certain income under a will that turned on an ecclesiastical determination of whether an individual would be appointed as a Catholic chaplain. The Court held that:

> "Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." *Id.* at 16, 74 L.Ed. 131.

The language in dicta suggesting a "fraud, collusion, or arbitrariness" exception was later repudiated, at least insofar as arbitrariness was concerned, in *Serbian Orthodox Diocese v. Milivojevich, supra.*

Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974), involved a claim by a minister that he had been fired by his church because of his promotion of racial integration within the community. Despite the minister's specific allegation that his termination had been for that impermissible purpose and, thus, itself violative of the Constitution, the Fifth Circuit unanimously affirmed the trial court's ruling that any inquiry into the reasons behind the church officials' decision to terminate the minister was barred by the First Amendment:

> "This case involves the fundamental question of who will preach from the pulpit of a church and who will occupy the church parsonage. The bare statement of the question should make obvious the lack of jurisdiction of a civil court . . . *Certainly a congregation's determination as to who shall preach from the church pulpit is at the very heart of the free exercise of religion* . . ." [*Id.* at 492 (emphasis added).]

Similarly, in *Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary*, 485 F.Supp. 255 (N.D. Tex. 1980), the District Court held that the EEOC was barred from inquiring into the hiring practices of a seminary. Although the court found that Congress had not intended to exempt religious organizations from jurisdiction under Title VII of the Civil Rights Act of 1964, it nevertheless held that any exercise of such jurisdiction to review the seminary's employment practices would violate the First Amendment. The court found not only that the Constitution prohibited any review of the seminary's choice of faculty

members and students but that it also applied to support personnel:

> "The risk of unseemly governmental entanglement increases exponentially as the function of an institution becomes more fundamentally and pervasively religious . . . A seminary's function within a particular religion is to replenish the core of the faithful . . .
>
> Application of the provisions of Title VII to any aspect of the employment relationship existing between the Seminary and its faculty and administrators, by virtue of their status as ministers, infringes upon the free exercise clause of the first amendment. (Citations.)" [*Id.* at 260.]

[*Accord, McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, 34 L.Ed.2d 153 (1962) (Application of equal employment provisions of Civil Rights Act to Salvation Army would violate First Amendment).]

In view of those controlling principles, it is manifest that the attempted discovery to which this Petition is addressed is barred by the First Amendment. That inquiry is directed to discovery of the facts relating to SINAI TEMPLE's hiring of Rabbi Silverman, including whether any background investigations were performed; the manner and means by which SINAI TEMPLE's governing body, its Board of Directors, thereafter supervised and monitored his performance of his duties; and the facts surrounding his subsequent resignation. Such a probe directly involves the issue of "who will preach from the congregation's pulpit," and, consequently, falls squarely within the area of inquiry held impermissible by *Serbian Orthodox Diocese*, *Gonzalez*, *Southwestern Baptist Theological Seminary* and *Simpson*. As those courts recognized, compelling SINAI TEMPLE to respond to such inquiries would result in precisely the type of excessive governmental entanglement in religious

affairs which the Constitution prohibits. For that reason alone then, Petitioners respectfully submit, this Petition should be granted.

II.

The Judicial System May Not Be Used for the Purpose of Settling Internal Grievances Against Religious Bodies.

A quick perusal of Real Party's Complaint makes it abundantly clear that, while Real Party is imaginative, he has no claim against Petitioners. Real Party has invented a tort on the part of Petitioners of "negligent hiring" to circumvent the abolition of the tort of alienation of affections.

What Real Party actually complains of as to Petitioners is SINAI TEMPLE's methods of operation. But this is exactly the sort of inquiry which the courts may not make. *Serbian Orthodox Diocese, supra,* 426 U.S. 696, 713; *Kedroff, supra,* 344 U.S. 94, 116. Thus Respondent Court erred in ordering compliance with discovery.

III.

Conclusion.

Since the information requested is protected by the First Amendment, Petitioners respectfully submit that Respondent Court's order compelling them to answer the twenty items was unconstitutional and an abuse of its discretion,

and, therefore, that a hearing by this Court should be granted and that the proceedings below should be stayed pending hearing in this Court.

Respectfully submitted,

HOWARD I. FRIEDMAN,
Attorney for Petitioners.

MICHAEL BROURMAN, Esq.,
ANN KOUGH, Esq. and
LOEB AND LOEB;
LAWRENCE E. PRICE, Esq.,
BONNIE LOUIS, Esq. and
THOMAS AND PRICE,
Of Counsel.

APPENDIX A.
Order.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Sinai Temple, etc., et al., Petitioners v. Superior Court of the State of California, County of Los Angeles, Respondent. Marvin Smotrich, Real Party in Interest. 2d Civ. No. 64348.

Filed Mar. 12, 1982.

THE COURT:

Having read the petition and reply thereto heretofore filed and having heard oral argument, conferred with counsel, and

GOOD CAUSE APPEARING THEREFOR:

We find no Constitutional or other infirmities with respect to any of the questions, interrogatories and/or requests for admissions with respect to which the petition for writ of prohibition has been heretofore filed with this court.

We therefore vacate any stay heretofore issued, deny the petition and discharge the alternative writ.

Petitioners allowed 10 days to comply with the Superior Court order of December 9, 1981.

APPENDIX B.
Minute Order.

Superior Court of California, County of Los Angeles, Dept. 88. Date, December 9, 1981; Honorable Thomas T. Johnson, Judge; J. Schmuki, Deputy Clerk; H. Cannon, Reporter.

C 353 230, Doctor Marvin Smotrich vs. Hillel Silverman, et al; Counsel for Plaintiff, Art Rutledge, Michael Alpert; Counsel for Defendant, Larry Price.
Nature of Proceedings.

Matter is argued and submitted.

Later:

Joint Statement Items are referred to in order presented in Joint Statement.

Motion to Compel Discovery First deposition. Questions numbers 1, 3, 4, 5, 6, 7, 9, 12, 13, 14, 15,-denied; 2 & 11-off calendar; 8 & 9 granted.

First Set Request for Admissions & Interrogatories: Numbers 1, 2, 3, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 28, 29-all denied.

Motion granted re numbers: 4, 5, 6, 7, 8 (for period 1/70-1/80), 9, 10, 11, 12, 25, 27 (except as to material protected by attorney/client or work product privilege).

Second Set Interrogatories: Numbers 3, 4, 8-granted; numbers 5, 6, 7, 9, 10, 11-denied.

Second Set Requests for Admissions: Number 1-denied.

Second Deposition: Numbers 1 & 10-granted. Numbers 3, 4, 5, 6, 7, 8, 9, 11-denied. Basis for rulings contained in Reporter's notes.

45 days to respond.

Responding party to give notice.

Copy of this minute order mailed by the clerk by US Mail.

Received Dec. 11, 1981 M.D. Minutes Entered Dec. 9, 1981 County Clerk.

APPENDIX C.

First Amendment to the United States Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D.

Discovery Items To Which This Petition is Directed

A. *First Set of Requests for Admissions and Interrogatories.*

REQUEST FOR ADMISSION NO. 4:

Admit that Rabbi Silverman was asked to resign by the Board of Directors of the Temple effective at or about May, 1980.

INTERROGATORY NO. 4:

If your response to Request for Admission No. four is anything other than an unqualified admission please state:

(a) Each fact on which you base your denial or qualified denial;

(b) Whether you know of any writing that contains any record of, reference to, or indication of any facts that support this denial or qualified denial;

(1) The date;

(2) A description of it sufficient for identification;

(3) The name and address of any person who has or claims to have any knowledge or information regarding any facts stated in your answer to subpart (a) of this interrogatory.

REQUEST FOR ADMISSION NO. 6:

Admit that at all times herein mentioned in the plaintiff's complaint Dr. Hillel Silverman acted within the course and scope of his employment of the defendant Sinai Temple.

INTERROGATORY NO. 6:

If your response to Request for Admission No. six is anything other than an unqualified admission please state:

(a) Each fact on which you base your denial or qualified denial;

(b) Whether you know of any writing that contains any record of, reference to, or indication of any facts that support this denial or qualified denial;

(1) The date;

(2) A description of it sufficient for identification;

(3) The name and address of any person who has or claims to have any knowledge or information regarding any facts stated in your answer to subpart (a) of this interrogatory.

REQUEST FOR ADMISSION NO. 7:

Admit that Rabbi Silverman was competent to perform marital counseling prior to May 1980. (limited to period of 1/70 - 1/80)

INTERROGATORY NO. 7:

If your response to Request for Admission No. seven is anything other than an unqualified admission please state:

(a) Each fact on which you base your denial or qualified denial;

(b) Whether you know of any writing that contains any record of, reference to or indication of any facts that support this denial or qualified denial;

(1) The date;

(2) A description of it sufficient for identification;

(3) The name and address of any person who has claims to have any knowledge or information regarding any facts stated in your answer to subpart (a) of this interrogatory.

REQUEST FOR ADMISSION NO. 8:

Admit that Rabbi Hillel Silverman was warned prior to providing marital counseling services to the plaintiff not to engage in extra-marital activities with any of the temple's parishioner's wife or wives. (limited to period of 1/70 - 1/80)

INTERROGATORY NO. 8:

If your response to Request for Admission No. eight is anything other than an unqualified admission please state:

(a) Each fact on which you base your denial or qualified denial;

(b) Whether you know of any writing that contains any record of, reference to, or indication of any facts that support this denial or qualified denial;

(1) The date;

(2) A description of it sufficient for identification;

(3) The name and address of any person who has or claims to have any knowledge or information regarding any facts stated in your answer to subpart (a) of this interrogatory.

REQUEST FOR ADMISSION NO. 12:

Admit that Rabbi Hillel Silverman was known to the Board of Directors of the Sinai Temple prior to May 1980 to have engaged in sexual intercourse with the plaintiff's wife.

INTERROGATORY NO. 12:

If your response to Request for Admission No. twelve is anything other than an unqualified admission please state:

(a) Each fact on which you base your denial or qualified denial;

(b) Whether you know of any writing that contains any record of, reference to, or indication of any facts that support this denial or qualified denial;

(1) The date;

(2) A description of it sufficient for identification;

(3) The name and address of any person who has or claims to have any knowledge or information regarding any facts stated in your answer to subpart (a) of this interrogatory.

REQUEST FOR ADMISSION NO. 25:

Admit that the Board of Directors of Sinai Temple prior to May 5, 1980, knew that Rabbi Hillel Silverman had sexual relations with the plaintiff's wife.

INTERROGATORY NO. 25:

If your response to Request for Admission No. twenty-five is anything other than an unqualified admission please state:

(a) Each fact on which you base your denial or qualified denial;

(b) Whether you know of any writing that contains any record of, reference to, or indication of any facts that support this denial or qualified denial;

(1) The date;

(2) A description of it sufficient for identification;

(3) The name and address of any person who has or claims to have any knowledge or information regarding any facts stated in your answer to subpart (a) of this interrogatory.

REQUEST FOR ADMISSION NO. 27:

Admit that there are records in the custody of the defendant Sinai Temple and its respective Board of Directors as it existed on May 1980 which show that the defendant Rabbi Hillel Silverman had sexual intercourse with parishioner's wives, including Dr. Smotrich's wife.

INTERROGATORY NO. 27:

If your response to Request for Admission No. twenty-seven is anything other than an unqualified admission please state:

(a) Each fact on which you base your denial or qualified denial;

(b) Whether you know of any writing that contains any record of, reference to, or indication of any facts that support this denial or qualified denial;

(1) The date;

(2) A description of it sufficient for identification;

(3) The name and address of any person who has or claims to have any knowledge or information regarding any facts stated in your answer to subpart (a) of this interrogatory.

B. *Second Set of Interrogatories.*

INTERROGATORY NO. 3:

Please state if any background investigation was done on Hillel Silverman prior to his being hired.

a. For such investigation, please state what investigation was actually done.

b. By whom said investigation was done.

c. What written documents you relied on in hiring Rabbi Hillel Silverman.

(1) Please describe said documents sufficient for a notice to produce as to the date of the document and a brief description of the document itself.

INTERROGATORY NO. 4:

Did any parishioners complain prior to May 5, 1980 to any employees or directors of officers of the defendant Sinai Temple of Dr. Hillel Silverman having sexual intercourse with any parishioner's wives.

C. *Deposition of Edward Kamenir.*

QUESTION NO. 1:

Is one of the functions of the board of directors of the Sinai Temple to determine from January 1, 1976 up until January 1, 1981, the appropriateness of the conduct of any rabbis that are employed by the Temple?

QUESTION NO. 10:

How about any meetings of the board of directors at that time with regard to his resignation (referring to Rabbi Silverman), do you recall being at any of those meetings?

D. *Deposition of Custodian of Records.*

QUESTION NO. 8:

Do you know if any such documents exist? (referring to any sub-rosa investigative reports of any private investigation done for Sinai Temple on Rabbi Hillel Silverman's activities prior to May 5, 1980.)

QUESTION NO. 9:

With regard to minutes and other written documents of the Board of Directors of the Sinai Temple from 1970 to 1980, do you know if any such documents exist?

APPENDIX E.

Second Amended Complaint for Breach of Contract; Fraud; Negligence; Negligent Infliction of Emotional Distress; Intentional Infliction of Emotional Distress; Negligent Employment; Constructive Fraud; Breach of Fiduciary Duty.

Superior Court of the State of California for the County of Los Angeles.

Doctor Marvin Smotrich, Plaintiff, vs. Hillel Silverman, Sinai Temple, a non-profit corporation; Mount Sinai Memorial Park, a non-profit corporation; William Friedland, Milton Siegel, Doris Siegel, and DOES 1 through 100, inclusive, Defendants. Case # C 353 230.

Plaintiff, DOCTOR MARVIN SMOTRICH, alleges as follows:

FIRST CAUSE OF ACTION FOR BREACH OF ORAL CONTRACT

(Against defendants Hillel Silverman & Sinai Temple)

1. Plaintiff, DOCTOR MARVIN SMOTRICH is a resident of the County of Los Angeles, State of California.

2. Defendants, Hillel Silverman, Doris Siegel, William Friedland, and Milton Siegel, were at all times herein mentioned residents of the County of Los Angeles, State of California.

3. All of the transactions, obligations and torts alleged herein occurred within the County of Los Angeles, State of California.

4. Defendant Sinai Temple is, and at all times herein mentioned was, a non-profit corporation organized for religious purposes or, in the alternative, a corporation sole or corporation for charitable purposes incorporated under the laws of the State of California and having its principle

place of business in the City of Los Angeles, County of Los Angeles, State of California. In the alternative, plaintiff alleges that Sinai Temple is, and at all times herein mentioned was, a non-profit unincorporated association having its principle office in the City of Los Angeles, County of Los Angeles, State of California.

5. Defendant Sinai Temple is sued solely at all times herein mentioned for conduct related to Sinai Temple's secular activity of rendering marriage counseling to parishioners, including plaintiff. Other secular activities of Sinai Temple include Bingo games, raffles and auctions. Defendant Sinai Temple is not being sued in its capacity as a provider of religious services and activities to parishioners, such as Barmitzvahs, weddings, bible teachings, or any other religious activity.

6. Defendants Milton Siegel, Doris Siegel and William Friedland, and Does 70 to 100, inclusive, are, and at all times were, the duly elected and acting and ostensible directors of defendant Sinai Temple.

7. From about January 1, 1976 to May 1, 1980, defendants Doris Siegel, Milton Siegel and William Friedland were duly elected and qualified as members of the Board of Directors and officers of Sinai Temple to serve as directors therein. By reason of the election and immediate acceptance of the office of director, defendants were at all material times and still are entitled to serve as directors and to participate in the management and control of the assets and property of defendant Sinai Temple, including its secular activities such as marriage counseling.

8. At all material times herein, plaintiff was a dues paying member of defendant Sinai Temple and a dues paying member of the congregation in good standing.

9. Defendant Mount Sinai Memorial Park, a non-profit corporation, is a corporation licensed and qualified to do business in the State of California. Mount Sinai Memorial Park is and at all times herein mentioned was the alter ego of the defendant Sinai Temple, as well as DOES 1 through 10, inclusive.

10. Defendant Hillel Silverman is and at all material times was the agent and servant of defendant Sinai Temple, and doing the things hereinafter mentioned as a marriage counselor was acting within the scope of such agency and service with the express ratification of defendant Sinai Temple.

11. Defendant Hillel Silverman is sued herein solely in his capacity as a marriage counselor. As a marriage counselor, he is authorized to provide the secular activity of marriage counseling without having to be licensed, pursuant to Section 17800.1 of the Business and Professions Code of the State of California. Moreover, medical doctors, lawyers and persons who are in the employ of governmental agencies and schools can perform marriage counseling without having to be licensed by the State of California, pursuant to Section 17800.1 of the Business and Professions Code of the State of California.

12. Defendant Hillel Silverman was at all times herein mentioned a duly ordained rabbi, licensed by the State of California, and a married man.

13. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 69, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this Complaint to allege the true names and capacities when same are ascertained. Plaintiff is informed and believes and thereon alleges that each of the defendants is negligently and intentionally responsible in

some manner for the occurrences herein alleged and that plaintiff's injuries and damages as herein alleged were proximately caused by such negligence or intentional acts.

14. On or about January 1, 1976, plaintiff entered into an oral agreement with defendant Sinai Temple and Hillel Silverman whereby defendants Sinai Temple and Hillel Silverman agreed to provide secular marital counseling services to the plaintiff, to continue indefinitely on an "as needed basis."

15. Plaintiff has performed all conditions, covenants and promises required by him on his part to be performed in accordance with the terms and conditions of the oral contract.

16. On or about January 1, 1976, and continuing until on or about February or March of 1979, defendants Sinai Temple and Hillel Silverman breached the oral agreement by failing to provide constructive marriage counseling services to the plaintiff. Defendants Sinai Temple and Hillel Silverman failed to inform plaintiff of the fact that Hillel Silverman was engaging in sexual intercourse with the plaintiff's wife while rendering non-religious marriage counseling advice to the plaintiff.

17. The breach of contract resulted from defendant Hillel Siverman's reassurance, during the secular marriage counseling sessions between the plaintiff and Hillel Silverman, that plaintiff's wife was faithful and that she loved the plaintiff and would continue to love the plaintiff if the plaintiff would follow defendant Hillel Silverman's marriage counseling advice.

18. The breach of contract also resulted from defendant Hillel Silverman's failure to inform plaintiff of defendant's conduct with the plaintiff's wife, active concealment of facts from the plaintiff which affected the marriage counselor/

patient relationship which existed between Hillel Silverman and plaintiff, as well as inducing and encouraging plaintiff to confide in defendant Silverman personal and private feelings about plaintiff's marriage, while engaging in sexual activity with the plaintiff's wife.

19. The relationship between the plaintiff and defendant Silverman, based on defendant's agreement to provide marriage counseling services to the plaintiff, continued from on or about January 1, 1976 until on or about February or March of 1979.

20. Plaintiff was unaware of Hillel Silverman's failure to provide adequate marriage counseling services as hereinabove alleged until May 1, 1980, whereupon it was announced by the president of Sinai Temple that defendant Hillel Silverman had engaged in adulterous sexual activites with several parishioners and at that time plaintiff was informed that defendant Hillel Silverman had engaged in adulterous sexual activity with the plaintiff's wife and had failed to constructively counsel the plaintiff.

21. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct, which occurred between January 1, 1976 and February or March 1979, because during said period of time a marriage counselor/patient relationship existed between plaintiff and defendant Hillel Silverman, and defendant Silverman, as the plaintiff's marriage counselor, intentionally concealed from the plaintiff, his patient, that he was engaging in sexual activity with the plaintiff's wife. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct between February or March of 1979 and May 1, 1980, because during said period of time defendants Hillel Silverman and Sinai Temple intentionally and actively concealed from the plaintiff material facts about the plaintiff's relationship with Hillel Silverman. Plaintiff could not have

learned about Hillel Silverman's wrongful and tortious conduct prior to May 1, 1980, because the facts comprising said wrongful and tortious subject conduct were not known, nor by using due care or diligence could have been known by the plaintiff until the directors of Sinai Temple announced defendant Hillel Silverman's wrongful and tortious acts to members of the congregation of Sinai Temple.

22. As a result of the breach of contract by defendants Hillel Silverman and Sinai Temple, plaintiff has sustained property damage in that during the time defendant Hillel Silverman engaged in illicit sexual intercourse with the plaintiff's wife, which was unknown to the plaintiff, plaintiff's father gave to the plaintiff and the plaintiff's wife over $100,000 worth of real property and other items. Had plaintiff known of defendant Silverman's adulterous conduct with the plaintiff's wife, plaintiff would have sought a divorce from his wife, thereby precluding his wife from receiving those items of property which were given by plaintiff's father, and that the plaintiff would have been entitled to and would have received but for the aforesaid conduct on the part of defendants Hillel Silverman and Sinai Temple. Said amount is in excess of $100,000.

23. As a further result of the breach of the oral contract as alleged, plaintiff was humilated and embarrassed; defendants' breach of contract led to a resultant, financial, physical and emotional harm to the plaintiff, as well as serious mental and emotional suffering.

24. As a further direct and proximate result of the breach of contract, plaintiff has suffered severe physical pain, injury and mental anguish as well as great shock and injury to his body and nervous system and will continue to suffer great pain and anguish to his body and mind, all to plaintiff's general damages in an amount well in excess of the minimum jurisdictional requirements of this Court.

25. Defendant Sinai Temple ratified the aforesaid actions of defendant Hillel Silverman, through its Board of Directors, and approved defendant Silverman's adulterous sexual activities with the plaintiff's wife, as well as with other parishioners' wives.

SECOND CAUSE OF ACTION: FRAUD
(Against defendants Hillel Silverman & Sinai Temple)

26. Plaintiff repeats and realleges paragraphs 1 through 13 of the First Cause of Action and incorporates the same by reference as if set forth in full herein.

27. On or about January 1, 1976, plaintiff and defendants Hillel Silverman and Sinai Temple entered into an oral contract whereby defendant Silverman was to render marriage counseling services, a non-religious activity, to the plaintiff. The marriage counseling services were continuously rendered to the plaintiff from on or about January 1, 1976, until on or about February or March, 1979.

28. On or about January 1, 1976, and continuously thereafter until February or March, 1979, plaintiff underwent non-religious marital counseling by defendant Silverman. During said perod of time, defendant Silverman did not tell plaintiff of his illicit sexual activities and the adulterous sexual intercourse between defendant Silverman and plaintiff's wife. Defendant Silverman used the guise of rendering marriage counseling service to the plaintiff to engage in adulterous intercourse with the plaintiff's wife. During said secular marriage counseling plaintiff repeatedly asked defendant Hillel Silverman as to the state of the plaintiff's marriage and how the plaintiff's wife was doing. He stated his wife was faithful. Defendant Silverman actively concealed material facts from the plaintiff by failing to disclose to the plaintiff that the was engaging in adulterous sexual activity with the plaintiff's wife.

29. Defendant Hillel Silverman encouraged and induced plaintiff to confide in defendant Silverman and to disclose highly personal and private feelings and thoughts about the plaintiff's marriage and used the confidential information received from plaintiff to engage in sexual activity with the plaintiff's wife.

30. Defendant Hillel Silverman used confidentially-acquired information about the plaintiff's marriage to destroy and break up the marriage instead of counselling the plaintiff as to how plaintiff could reconcile and improve his marriage relationship.

31. At all material times, defendant Silverman was acting as the plaintiff's marriage counselor, confidant and person of trust. As the plaintiff's marriage counselor, confidant, defendant Silverman had a duty to disclose any material facts which affected the plaintiff's relationship with his marriage counselor and his marriage.

32. At all material times, defendant Silverman represented to plaintiff that his marriage was intact and good and that his wife was doing fine. Defendant Silverman failed to reveal and supressed the fact that he had engaged and was continuing to engage in adulterous sexual activities with the plaintiff's wife. Plaintiff was at all times ignorant of the existence of the above stated facts which defendant Silverman suppressed and failed to disclose until May 1, 1980.

33. Defendant Silverman's failure to disclose those material facts was performed with the intent to deceive and defraud plaintiff.

34. At all times during the secular marriage counseling services, plaintiff was ignorant of the existence of the facts which defendant suppressed and failed to disclose. Plaintiff was ignorant of the adulterous sexual activity engaged in by defendant Silverman.

35. The representations made to the plaintiff by defendant Silverman that the plaintiff's marriage was doing well and his wife was faithful was performed by defendant Silverman with the intent to deceive and defraud plaintiff.

36. The representations made by defendant Silverman were in fact false and were known by defendant Silverman to be false at the time they were made and at all times herein mentioned.

37. Plaintiff relied on the representations by defendant Hillel Silverman by continuing to seek marriage counseling advice from defendant Silverman while in his employ as a marriage counselor with Sinai Temple.

38. The plaintiff was justified in relying on the defendant's representations because defendant Silverman was the plaintiff's marriage counselor and confidant and held the position of trust of the highest degree. Defendant Hillel Silverman had knowledge of facts concerning his illicit activities with the plaintiff's wife, but failed to reveal these facts to the plaintiff during the time he was providing marriage counseling services to the plaintiff. The relationship between the plaintiff and defendant Silverman was fiduciary in nature and the plaintiff could not have, with due diligence, found out the true state of affairs between defendant Silverman and the plaintiff's wife because plaintiff was continuing to seek marriage counseling advice from defendant Silverman.

39. On or about January 1, 1976, and continuing until on or about February or March 1979, defendant Hillel Silverman and Barbara Smotrich conspired to defraud the plaintiff of property and other financial assets by encouraging plaintiff to give plaintiff's wife several pieces of jewelry and other personal property on the fraudulent premise that by doing so, plaintiff's marriage would improve.

40. On or about May 1, 1980, the plaintiff first learned of the illicit affair that occurred between the plaintiff's wife and defendant Silverman, in that plaintiff first learned on that date that defendant Silverman engaged in adulterous sexual intercourse with the plaintiff's wife under the fraudulent pretext of providing secular marriage counseling services to the plaintiff and his wife.

41. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct, which occurred between January 1, 1976 and February or March 1979, because during said period of time a marriage counselor/patient relationship existed between plaintiff and defendant Hillel Silverman, and defendant Silverman, as the plaintiff's marriage counselor, intentionally concealed from the plaintiff, his patient, that he was engaging in sexual activity with the plaintiff's wife. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct between February or March of 1979 and May 1, 1980, because during said period of time defendants Hillel Silverman and Sinai Temple intentionally and actively concealed from the plaintiff material facts about the plaintiff's relationship with Hillel Silverman. Plaintiff could not have learned about Hillel Silverman's wrongful and tortious conduct prior to May 1, 1980, because the facts comprising said wrongful and tortious conduct were not known, nor by using due care or diligence could have been known by the plaintiff until the directors of Sinai Temple announced defendant Hillel Silverman's wrongful and tortious act to members of the congregation of Sinai Temple on or about May 1, 1980.

42. As a direct result of defendant Silverman's fraud and deceit, plaintiff was damaged in the sum of over $100,000 with respect to transactions that plaintiff entered into with his father, as well as in excess of $300,000 due

to the accumulation of community property during the pendency of the marriage counseling services.

43. As a further result of the defendants' fraud and deceit, plaintiff underwent severe emotional distress, mental anxiety, humiliation and embarrassment. The plaintiff suffered severe pain, injury and mental anguish and great shock and injury to his body and nervous system.

44. In doing the acts herein alleged, defendant Silverman acted in conscious disregard of plaintiff's rights and interests and acted with oppression, fraud and malice, entitling the plaintiff to punitive damages in the sum of $1,000,000.

45. During said period of time, the officers, directors and employees of defendant Sinai Temple hired private investigators to surveill defendant Silverman's activities and found, during the course of said investigation, that defendant Hillel Silverman had adulterous affairs with parishioners' wives.

46. The managing officers and directors of defendant Sinai Temple approved and ratified defendant Silverman's fraudulent conduct and adulterous activities and concealment of material facts and is therefore liable for punitive damages in the sum of $1,000,000.

THIRD CAUSE OF ACTION: NEGLIGENCE

(Against defendants Hillel Silverman and Sinai Temple)

47. Plaintiff repeats and realleges paragraphs 1 through 13 of his First Cause of Action and incorporates the same by reference as if set forth in full herein.

48. On or about January 1976 and continuing until May 1, 1980, plaintiff was an active and paying member of defendant Sinai Temple, as well as a member of the con-

gregation with active participation in all of the congregation's activities and in good standing.

49. Defendant Sinai Temple and defendant Hillel Silverman offered to their congregation marital counseling services, a secular activity, without any fee or charge other than normal membership fee which was duly paid by the plaintiff herein.

50. Defendant Hillel Silverman offered marital counseling services, a secular activity, to all members of the congregation of defendant Sinai Temple. Defendants Silverman and Sinai Temple warranted that all secular marital counseling services rendered would be within the standard of practice of marital counselors in the community of the City of Los Angeles.

51. From on or about January 1, 1976, to February or March 1979, plaintiff continuously underwent marital counseling by defendant Hillel Silverman acting under the authority of defendant Sinai Temple and within the scope of his employment as a marriage counselor. At all times herein, defendant Silverman was the agent and employee of each of the co-defendants and doing the things herein mentioned was acting in the scope of his authority as an agent and employee and with the permission and consent of his co-defendants in his capacity as a marriage counselor.

52. Defendants Hillel Silverman and Sinai Temple negligently failed to provide secular marital counseling services within the standard of practice in the community of the City of Los Angeles, in that defendant Silverman failed to constructively counsel the plaintiff by failing to reveal and actively concealing material facts regarding the relationship between the plaintiff and defendant Hillel Silverman by inducing plaintiff to confide highly personal and confidential feeling about plaintiff's marriage to defendant Hillel Sil-

verman during the time defendant Silverman was engaging in adulterous sexual activity and sexual intercourse with plaintiff's wife during the time that defendant Silverman was rendering marriage counseling to the plaintiff.

53. As a proximate result of the negligence of defendants, and each of them, plaintiff was injured in his health, strength and activity, sustaining bodily injuries and shock and injury to his nervous system, which have caused and will cause him great mental and physical pain and suffering all to his damage in the sum in excess of the minimum jurisdiction of this Court. Plaintiff will amend this Complaint to state such amount when the same becomes known to him or on proof thereof.

54. As a further proximate result of the aforesaid negligence of the defendants, and each of them, plaintiff has incurred loss of community property and separate property which was bestowed upon the plaintiff and the plaintiff's wife by the plaintiff's father during the period of time that the plaintiff and his wife were undergoing marriage counseling by defendant Silverman in his employ as a marriage counselor for Sinai Temple. Had the plaintiff known the true state of affairs between defendant Silverman and the plaintiff's wife, plaintiff would have left his wife prior to their separation on February 1, 1979. The full amount of property loss is unknown to plaintiff at this time, and plaintiff will amend this Complaint when the same becomes known to him or on proof thereof at the time of trial.

55. As a further proximate result of the aforesaid negligence of defendants, and each of them, plaintiff has incurred loss of community property and separate property which was bestowed upon the plaintiff and the plaintiff's wife by the plaintiff's father during the period of time that the plaintiff and his wife were undergoing marriage counseling by defendant Hillel Silverman in his employ as a

marriage counselor for Sinai Temple. The full amount of property loss is unknown to plaintiff at this time, and plaintiff will amend this Complaint when the same becomes known to him or on proof thereof at the time of trial.

56. On or about May 1, 1980, the plaintiff first learned of the illicit affair that occurred between the plaintiff's wife and defendant Hillel Silverman, in that plaintiff first learned on that date that defendant Silverman engaged in adulterous sexual intercourse with the plaintiff's wife under the fraudulent pretext of providing secular marriage counseling services to the plaintiff and his wife.

57. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct, which occurred between January 1, 1976 and February or March 1979, because during said period of time a marriage counselor/patient relationship existed between plaintiff and defendant Hillel Silverman, and defendant Silverman, as the plaintiff's marriage counselor, intentionally concealed from the plaintiff, his patient, that he was engaging in sexual activity with the plaintiff's wife. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct between February or March of 1979 and May 1, 1980, because during said period of time defendants Hillel Silverman and Sinai Temple intentionally and actively concealed from the plaintiff material facts about the plaintiff's relationship with Hillel Silverman. Plaintiff could not have learned about Hillel Silverman's wrongful and tortious conduct prior to May 1, 1980, because the facts comprising said wrongful and tortious conduct were not known, nor by using due care or diligence could have been known by the plaintiff until the directors of Sinai Temple announced defendant Hillel Silverman's wrongful and tortious acts to members of the congregation of Sinai Temple which was on or about May 1, 1980.

FOURTH CAUSE OF ACTION: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

(Against defendants Hillel Silverman & Sinai Temple)

58. Plaintiff repeats and realleges paragraphs 1 through 13 of his First Cause of Action, paragraphs 25 through 32, 41 of the Second Cause of Action and paragraphs 49 through 52 of his Third Cause of Action and incorporates the same by reference as if set forth in full herein.

59. As a proximate result of the aforementioned acts, plaintiff suffered humiliation, mental anguish, anxiety, embarrassment and emotional and physical distress, all to his damage in a sum well in excess of the minimum jurisdiction of this Court. Plaintiff will amend this Complaint to state such amount when the same becomes known to him or on proof thereof.

FIFTH CAUSE OF ACTION: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

(Against defendants Hillel Silverman & Sinai Temple)

60. Plaintiff repeats and realleges paragraphs 1 through 13 of his First Cause of Action and paragraph 52 of his Third Cause of Action and incorporates same by reference as if set forth in full herein, save for the word "negligently."

61. Defendant Hillel Silverman was, at all times herein mentioned, a marriage counselor and the agent and employee of defendant Sinai Temple, and in doing the things as hereinafter alleged was acting within the course and scope of such agency and the permission and consent of his co-defendant Sinai Temple.

62. From on or about January 1, 1976 to February or March of 1979, plaintiff underwent secular marital counseling by defendant Silverman while employed in his capacity as a marriage counselor by defendant Sinai Temple.

During that period of time and continuously thereafter, defendant Hillel Silverman engaged in sexual activities with the plaintiff's wife under the guise and pretext of rendering marriage counseling services to the plaintiff. Defendant Silverman induced and encouraged plaintiff to confide in defendant Silverman highly personal thoughts and feelings about the plaintiff's marriage during that time defendant Silverman was engaging in sexual activity with the plaintiff's wife.

63. Defendant Silverman's conduct was intentional, malicious and done for the purpose of causing plaintiff to suffer humiliation, mental anguish, embarrassment, anxiety, worry and emotional and physical distress. Defendant's conduct in engaging in adulterous sexual intercourse with the plaintiff's wife during the time that defendant was acting as the plaintiff's marriage counselor performing such secular activity of marrige counseling, was done with knowledge that plaintiff's emotional and physical distress would increase and was done with a wanton and reckless disregard of the consequences to plaintiff.

64. Defendant Silverman's conduct in engaging in adulterous sexual intercourse with the plaintiff's wife during the time that defendant was acting as the plaintiff's marriage counselor was extreme and outrageous.

65. As as proximate result of the aforementioned acts, plaintiff suffered humiliation, mental anguish, anxiety, embarrassment and emotional and physical distress, all to his damage in a sum well in excess of the minimum jurisdiction of this Court. Plaintiff will amend this Complaint to state such amount when the same becomes known to him or on proof thereof.

66. As a further proximate result of the aforementioned acts, plaintiff sustained property loss with respect to prop-

erty given to plaintiff and the plaintiff's wife by the plaintiff's father during the period of time that plaintiff and his wife received marital counseling services, a secular activity. Had the plaintiff known of the true state of affairs of his marriage and the defendant's adulterous conduct with the plaintiff's wife, plaintiff would have sought a divorce from his wife, precluding his wife from receiving certain items of property from the plaintiff's father, which plaintiff would have received but for the above mentioned acts of defendant Silverman.

67. The aforementioned acts of defendant Silverman were willful, wanton, malicious and done with a conscious disregard of the plaintiff, justifying an award of exemplary and punitive damages in the amount of $1,000,000.

68. During said period of time, officers, directors and employees of defendant Sinai Temple hired private investigators to surveill defendant Silverman's activities and found, during the course of said investigation, that defendant Hillel Silverman had adulterous affairs with parishioners' wives.

69. Defendant Sinai Temple ratified and approved of defendant Silverman's adulterous sexual activities with the plaintiff's wife and is also therefor liable for $1,000,000 in punitive damages.

70. Plaintiff did not know of defendant Silverman's aforesaid adulterous sexual activities as heretofore alleged until May 1, 1980, whereon it was announced by the president of Sinai Temple that defendant Silverman had engaged in various adulterous sexual activities. At said time, the plaintiff was first apprised of defendant Hillel Silverman's adulterous activities with the plaintiff's wife.

71. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct, which occurred

between January 1, 1976 and February or March 1979, because during said period of time a marriage counselor/patient relationship existed between plaintiff and defendant Hillel Silverman, and defendant Silverman, as the plaintiff's marriage counselor, intentionally concealed from the plaintiff, his patient, that he was engaging in sexual activity with the plaintiff's wife. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct between February or March of 1979 and May 1, 1980, because during said period of time defendants Hillel Silverman and Sinai Temple intentionally and actively concealed from the plaintiff material facts about the plaintiff's relationship with Hillel Silverman. Plaintiff could not have learned about Hillel Silverman's wrongful and tortious conduct prior to May 1, 1980, because the facts comprising said wrongful and tortious conduct were not known, nor by using due care or diligence could have been known by the plaintiff until the directors of Sinai Temple announced defendant Hillel Silverman's wrongful and tortious acts to members of the congregation of Sinai Temple.

SIXTH CAUSE OF ACTION: NEGLIGENT EMPLOYMENT

(Against defendants Silverman & Sinai Temple)

72. Plaintiff repeats and realleges paragraphs 1 through 25 of his First Cause of Action, paragraphs 26 through 46 of his Second Cause of Action, paragraphs 47 thru 57 of his Third Cause of Action, paragraphs 58 and 59 of his Fourth Cause of Action, paragraphs 60 through 71 of his Fifth Cause of Action, all of which paragraphs are hereby incorporated by reference as though fully set forth herein.

73. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 70 through 100, inclusive, and therefore sues these defendants by such fictitious

names. Plaintiff will amend this Complaint to allege the true names and capacities when the same are ascertained. Plaintiff is informed and believes and thereon alleges that each of such defendants is negligently responsible in some manner for the occurrences herein alleged and that plaintiff's injuries and damages were proximately caused by such negligence. In addition, plaintiff alleges that DOES 70 through 100, as DCE directors of defendant Sinai Temple, did the hereinafter stated acts, including, but not limited to, negligently retaining defendant Hillel Silverman as a marriage counselor, a secular profession, as well as participating in directing a "cover up" of defendant Silverman's adulterous sexual activities with the plaintiff's wife during the time that defendant Silverman was allegedly rendering secular marital counseling services to the plaintiff.

74. Defendant Sinai Temple, in its secular capacity, negligently employed and retained defendant Silverman as a marriage counselor providing non-religious services during all times herein mentioned with the express knowledge of defendant Silverman's adulterous sexual activities and affairs with the plaintiff's wife as well as with other parishioners' wives. At all times herein mentioned and four (4) years prior to the plaintiff entering into a marital counseling agreement with defendants Silverman and Sinai Temple, the Board of Directors of Sinai Temple, as well as other employees and officers of defendant Sinai Temple, knew that defendant Silverman used his office of marital counselling, a secular profe[illegible]ional, in order to engage in adulterous sexual activities with the plaintiff's wife and other members of the congregation. Defendants and each of them knew that defendant Silverman, for many years prior to his agreeing to provide plaintiff with non-religious marital counseling services, engaged in adulterous sexual activities with other parishioners and members of the congregation

under the guise of rendering secular marital counseling services.

That during said period of time, officers, directors and employees of the defendant Sinai Temple hired private investigators to "tail" the defendant Hillel Silverman, a married man, and found during the course of said investigation that the defendant Hillel Silverman had adulterous affairs with parishioners' wives.

That at the time the defendant Hillel Silverman was first hired by the defendant Sinai Temple in the capacity of marriage counselor, that certain officers, directors and employees knew that Hillel Silverman in his previous employment as a Rabbi and marriage counselor for a congregation in Dallas, Texas, engaged in adulterous sexual intercourse with parishioners' wives of that congregation in Dallas, Texas.

75. At all times herein, the relationship between the plaintiff and defendants Doris Siegel, Milton Siegel, William Friedland and Does 70 through 100 was fiduciary in nature as the plaintiff was an outstanding and paying member of the congregation of defendant Sinai Temple.

76. At all times herein mentioned, defendants Doris Siegel, Milton Siegel, William Friedland and Does 70 through 100, as well as defendant Sinai Temple knew of defendant Silverman's nefarious activities and approved and ratified said activities prior to the time plaintiff and defendant Silverman entered into a secular marital counseling service agreement and during the time that defendant Silverman was allegedly providing marital counseling, a secular activity, to the plaintiff.

77. During said period of time, defendant Sinai Temple, by and through its directors, officers and employees, including defendant directors William Friedland, Doris Siegel

and Milton Siegel, as well as Does 70 through 100, did nothing to stop defendant Hillel Silverman's adulterous sexual activities, all to the plaintiff's damage. Defendant Sinai Temple, by and through its directors, defendants William Friedland, Doris Siegel, Milton Siegel and Does 70 through 100, allowed defendant Silverman's nefarious activities to continue and did not disclose to the remainder of the congregation who would seek marital counseling, nor to the plaintiff, defendants' knowledge about defendants Silverman's adulterous sexual activities with members of the congregation.

78. Defendant Sinai Temple, by and through its Board of Directors, including Doris Siegel, Milton Siegel, William Friedland and Does 70 through 100, had prior knowledge of the unfitness of defendant Silverman as a marital counselor and employed him as a marriage counselor with a conscious disregard of the rights or safety of the members of the congregation who would undergo marital counseling at Sinai Temple, and authorized and ratified defendant Silverman's wrongful conduct.

79. Although defendant Sinai Temple and defendants Doris Siegel, Milton Siegel, William Friedland and Does 70 through 100 had knowledge of defendant Silverman's adulterous sexual conduct, defendants failed to take any action to reprimand, fire or otherwise dismiss defendant Hillel Silverman from his capacity as a marital counselor many years prior to the date plaintiff entered into an agreement with defendants Silverman and Sinai Temple for marital counseling services, a secular activity. In addition, said directors failed to prevent, or otherwise stop defendant Silverman's adulterous sexual conduct during the time that defendant Silverman was providing secular marital counseling services to plaintiff (and the plaintiff's wife) from on or about January 1, 1976 through May 1, 1980. Said knowl-

edge of defendant Silverman's adulterous sexual conduct was well known to the officers, directors and managing agents of defendant Sinai Temple.

80. As a proximate result of defendant' negligent employment in hiring defendant Silverman in the capacity of a marriage counselor, as well as negligent retention of defendant Silverman's services as a provider of non-religious marriage counseling, plaintiff sustained community property loss as heretofore alleged in Paragraph 54 of the Third Cause of Action which is incorporated herein by reference, as well as severe physical pain, injury, mental anguish, and great shock and injury to his body and nervous system. Plaintiff will continue to suffer great pain and anguish of his body and mind, all to the plaintiff's general damage in an amount well in excess of the jurisdictional minimum of this Court.

SEVENTH CAUSE OF ACTION: CONSTRUCTIVE FRAUD

(Against defendants Sinai Temple, Doris Siegel, Milton Siegel, William Friedland and Does 70 through 100)

81. Plaintiff repeats and realleges paragraph 72 of his Sixth Cause of Action and incorporates the same by reference as if set forth in full herein.

82. On or about January 1, 1976, continuing until February or March 1979, plaintiff was an active and paying member of defendant Sinai Temple as well as a member of the congregation with active participation in all of the congregation's activities, including its secular activities such as marriage counseling.

83. Defendant Sinai Temple and defendant Silverman offered to their congregation marital counseling services, a secular activity, without any fee or charge other than

normal membership fee which was duly paid by the plaintiff herein.

84. Defendant Silverman offered marital counseling services, a secular activity, to all members of the congregation of defendant Sinai Temple. Defendants Silverman and Sinai Temple warranted that all secular marital counseling services rendered would be within the standard of practice of marital counselors in the community of the City of Los Angeles.

85. From on or about January 1, 1976 until February or March 1979, plaintiff underwent marital counseling by defendant Silverman, who was acting under the secular authority of defendant Sinai Temple and within the scope of his employment as a marriage counselor. At all times herein, defendant Silverman was the agent and employee of each of the co-defendants and doing the things herein mentioned was acting in the scope of his authority as an agent and employee and with the permission and consent of his co-defendants.

86. On or about January 1, 1976 and continuously thereafter until February or March 1979, plaintiff underwent marital counseling, a secular activity, by defendant Silverman. During said period of time, defendant Silverman did not tell plaintiff of his illicit sexual activities and the adulterous sexual intercourse between defendant Silverman and plaintiff's wife. Defendant Silverman used the guise of rendering secular marriage counseling services to the plaintiff and plaintiff's wife to engage in adulterous intercourse with the plaintiff's wife. During said secular marriage counseling, plaintiff repeatedly asked defendant Silverman as to the state of the plaintiff's marriage and how plaintiff's wife was doing. Said defendant told him that his marriage was intact. Defendant Silverman actively concealed marital facts from the plaintiff by failing to disclose to the plaintiff that

he was engaging in adulterous sexual activity with the plaintiff's wife. Defendant Silverman induced and encouraged plaintiff to confide in defendant highly personal thoughts and feelings about the plaintiff's marriage during the time defendant Hillel Silverman was engaging in sexual activity with the plaintiff's wife.

87. At all times herein, defendant Silverman was acting as the plaintiff's marriage counselor, confidant and person of trust. As the plaintiff's marriage counselor and confidant, defendant Silverman had a duty to disclose any material facts which affected the plaintiff's relationship with his marriage counselor.

88. At all material times, defendant Silverman represented to plaintiff that his marriage was intact and in good condition and that plaintiff's wife was doing fine. Defendant Silverman failed to reveal and suppressed the fact that he had engaged in and was continuing to engage in adulterous sexual activities with the plaintiff's wife. Plaintiff was at all times ignorant of the existence of the above stated facts which defendant Silverman suppressed and failed to disclose until May 1, 1980, wherein at said time, the plaintiff first learned of defendant Hillel Silverman's adulterous activities with the plaintiff's wife.

89. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct, which occurred between January 1, 1976 and February or March 1979, because during said period of time a marriage counselor/patient relationship existed between plaintiff and defendant Hillel Silverman, and defendant Silverman, as the plaintiff's marriage counselor, intentionally concealed from the plaintiff, his patient, that he was engaging in sexual activity with the plaintiff's wife. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct between February or March of 1979 and May 1, 1980,

because during said period of time defendants Hillel Silverman and Sinai Temple intentionally and actively concealed from the plaintiff material facts about the plaintiff's relationship with Hillel Silverman. Plaintiff could not have learned about Hillel Silverman's wrongful and tortious conduct prior to May 1, 1980, because the facts comprising said wrongful and tortious conduct were not known, nor by using due care or diligence could have been known, by the plaintiff until the directors of Sinai Temple announced defendant Hillel Silverman's wrongful and tortious acts to members of the congregation of Sinai Temple.

90. At all times herein mentioned and for approximately four (4) years prior to the time plaintiff entered into a secular marriage counseling agreement with defendant Hillel Silverman and defendant Sinai Temple, defendants William Friedland, Doris Siegel and Milton Siegel, as well as Does 70 through 100 knew that defendant Silverman used his office as marriage counselor of the temple in order to engage in sexual relations with parishioners and with plaintiff's wife under the guise of rendering secular marital counseling services.

91. Plaintiff placed trust in defendants Silverman and Sinai Temple due to the fact that defendant Silverman was plaintiff's marriage counselor and was placed in the highest position of trust. As plaintiff's marriage counselor, there was a confidential, fiduciary and secular relationship between the plaintiff and defendant Silverman and defendant Sinai Temple.

That during said period of time, officers, directors and employees of the defendant Sinai Temple hired private investigators to "tail" the defendant Hillel Silverman, a married man, and found during the course of said investigation that the defendant Hillel Silverman had adulterous affairs with parishioners' wives.

92. Defendants Doris Siegel, Milton Siegel and William Friedland, as well as Does 70 through 100, and defendant Sinai Temple knew of defendant Silverman's adulterous sexual activities and approved of said activities by failing to disclose to the plaintiff detailed information relating to defendant Silverman's adulterous conduct with plaintiff's wife and fraudulently concealing from the plaintiff the fact that defendant Silverman had used his position as rabbi and marital counselor to engage in adulterous sexual activities with plaintiff's wife.

93. Defendants Hillel Silverman, Milton Siegel, Doris Siegel, William Friedland, Sinai Temple and Does 70 through 100 did the facts herein alleged with the intention to deceive and defraud plaintiff and to conceal from plaintiff the fact that defendant Silverman had engaged in adulterous sexual activities with the plaintiff's wife while acting as the plaintiff's marital counselor. Defendants, and each of them, did these acts with the intent to induce reliance by plaintiff in the continuing trust and confidence of defendant Silverman as his marriage counselor.

94. In doing the acts herein alleged, defendants and each of them acted with oppression, fraud, and malice and acted with a conscious disregard of the rights of plaintiff, entitling the plaintiff to punitive damages in the sum of $1,000,000.

95. As a further proximate result of the acts of defendants, and each of them, plaintiff has suffered severe physical pain, injury, mental anguish, emotional distress, embarrassment, humiliation and great shock and injury to his body and nervous system, and will continue to suffer great pain and anguish of his body and mind all to the plaintiff's general damages in an amount well in excess of the jurisdictional requirements of this Court.

96. As a further proximate result of the acts herein alleged, plaintiff has incurred loss of community property which was bestowed upon the plaintiff and plaintiff's wife by plaintiff's father during the period of time that plaintiff and his wife were undergoing marriage counseling by defendant Silverman while in his employ as a rabbi for Sinai Temple.

EIGHTH CAUSE OF ACTION: BREACH OF FIDUCIARY DUTY

(Against defendants Sinai Temple, Doris Siegel, Milton Siegel, William Friedland, Hillel Silverman and Does 70 through 100)

97. Plaintiff repeats and realleges paragraph 72 of his Sixth Cause of Action and incorporates the same by reference as if set forth in full herein.

98. At all times herein mentioned, defendant Silverman was acting as plaintiff's marital counselor, confidant and person of trust. By virtue of defendant Silverman's capacity as plaintiff's marriage counseler, defendant Silverman owed to plaintiff a fiduciary duty, and by virtue of plaintiff's having placed confidence and trust in the integrity of defendant Silverman in providing secular marital counseling services to the plaintiff a confidential, fiduciary and secular relationship existed at all times herein mentioned between plaintiff and defendant Silverman.

99. At all times herein, plaintiff was an outstanding member of the congregation of defendant Sinai Temple and contributed to the congregation and temple as a paying member. As a result of plaintiff's status as a member of the congregation, and a person receiving marital counseling, a fiduciary relationship existed between the plaintiff and the Board of Directors, consisting of Doris Siegel, Milton Siegel, William Friedland and Does 70 through 100.

100. Defendants Doris Siegel, Milton Siegel, William Friedland and Does 70 through 100 failed to exercise that degree of care required of directors of religious corporations in providing secular marital counseling services in that they intentionally and willfully, after having knowlede of defendant Hillel Silverman's adulterous sexual activities with parishioners, concealed this information from the congregation who would seek secular marital counseling and the plaintiff up to and until May 1, 1980. Defendants, and each of them, as directors of Sinai Temple, failed to act with such care as was appropriate under the circumstances in their providing secular marital counseling services by failing to reveal to the plaintiff and the other members of the Sinai Temple's congregation who would seek marital counseling services of defendant Silverman's illicit sexual conduct.

That during said period of time, officers, directors and employees of the defendant Sinai Temple hired private investigators to "tail" the defendant Hillel Silverman, a married man, and found during the course of said investigation that the defendant Hillel Silverman had adulterous affairs with parishioners' wives.

101. By failing to reveal and by actively concealing the above listed acts of defendant Silverman, defendants Doris Siegel, Milton Siegel, William Friedland and Does 70 through 100 failed to act in good faith, in a manner in the best interests of the corporation in its capacity of providing secular marital counseling services, and failed to act with such care as was appropriate under the circumstances of which marital counseling firms would so act.

102. As a proximate result of the breach of fiduciary duty of said defendants as directors of defendant Sinai Temple, plaintiff sustained property damage as heretofore alleged in paragraph 54 of the Third Cause of Action.

103. As a further proximate result of the acts of defendants, and each of them, plaintiff has suffered severe physical pain, injury, mental anguish, great shock and injury to his body and nervous system and will continue to suffer great pain and anguish of his body and mind, all to the plaintiff's general damages in an amount well in excess of the jurisdictional requirements of this Court.

104. Defendants, and each of them, acted intentionally, willfully and inconscious disregard of the plaintiff's rights, thereby entitling plaintiff to punitive damages in the sum of $1,000,000.

105. Plaintiff was not advised of defendant Hillel Silverman's adulterous conduct nor did plaintiff have any knowledge of his conduct prior to May 1, 1980, at which time defendant William Friedland, Doris Siegel, Milton Siegel and Does 70 through 100 disclosed to the congregation of defendant Sinai Temple, defendant Silverman's conduct. Defendants Doris Siegel, Milton Siegel, William Friedland and Does 70 through 100 had concealed and attempted to cover up information relating to defendant Silverman's adulterous sexual activities until May 1, 1980.

106. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct, which occurred between January 1, 1976 and February or March 1979, because during said period of time a marriage counselor/patient relationship existed between plaintiff and defendant Hillel Silverman, and defendant Silverman, as the plaintiff's marriage counselor, intentionally concealed from the plaintiff, his patient, that he was engaging in sexual activity with the plaintiff's wife. Plaintiff could not have learned of defendant Hillel Silverman's wrongful and tortious conduct between February or March 1979 and May 1, 1980, because during said period of time defendants Hillel Silverman and Sinai Temple intentionally and actively concealed from the

plaintiff material facts about the plaintiff's relationship with Hillel Silverman. Plaintiff could not have learned about Hillel Silverman's wrongful and tortious conduct prior to May 1, 1980, because the facts comprising said wrongful and tortious conduct were not known, nor by using care or diligence could have been known, by the plaintiff until the directors of Sinai Temple announced defendant Hillel Silverman's wrongful and tortious acts to members of the congregation of Sinai Temple on or about May 1, 1980.

WHEREFORE, plaintiff DOCTOR MARVIN SMOTRICH prays for judgment against the defendants, and each of them, as follows:

1. For general damages in an amount to be ascertained;
2. For special damages in an amount to be ascertained;
3. For punitive damages in the amount of one million dollars ($1,000,000);
4. For costs of suit and such other and further relief as this Court deems just and proper.

Dated: July 29, 1981

HAGENBAUGH & MURPHY
A Professional Corporation
By /s/ Arthur D. Rutledge
ARTHUR D. RUTLEDGE
Attorneys for Plaintiff

APPENDIX F.

Answer to Second Amended Complaint.

Superior Court of the State of California for the County of Los Angeles.

Doctor Marvin Smotrich, Plaintiff, vs. Hillel Silverman, Sinai Temple, etc., et al., Defendants. Case Number: C 353230.

COMES NOW Defendants, SINAI TEMPLE, a non-profit corporation, WILLIAM FRIEDLAND, MILTON SIEGEL, DORIS SIEGEL, and MOUNT SINAI MEMORIAL PARK, a subsidiary of Defendant, SINAI TEMPLE, and for themselves alone and no others, and allege, complain, and answer the second amended complaint of Plaintiff herein as follows:

1. Pursuant to the provisions of Section 431.30(d) of the *California Code of Civil Procedure*, these Defendants deny each and every allegation contained in each and every cause of action set forth in Plaintiff's second amended complaint herein, and the whole of the second amended complaint thereof, and further denies that these Defendants are or will become liable to the Plaintiff in any sum whatsoever.

FIRST AFFIRMATIVE DEFENSE

2. Plaintiff's second amended complaint and all purported causes of action stated therein, and all or any parts thereof, fails to set forth facts sufficient to state a cause of action against these answering Defendants, or any one of them.

SECOND AFFIRMATIVE DEFENSE

3. That the negligence and carelessness of Plaintiff proximately caused and contributed to the injuries and damages, if any, complained of and that Plaintiff's recovery, if any, is barred in proportion to which his contributory negligence led to damages, if any, of which he complaints.

THIRD AFFIRMATIVE DEFENSE

4. That said injuries or damages complained of herein, if any, resulted from a superseding, intervening act of another person or persons, whether named herein or not, which were the proximate cause of the injuries or damages, if any, complained of herein.

FOURTH AFFIRMATIVE DEFENSE

5. That the injuries or damages, if any, sustained by Plaintiff were proximately contributed to or caused by other Defendants, whether served or not served, and/or by other persons or companies not parties to this action, and it is necessary that the proportionate degree of negligence or fault of each of said other persons or companies, whether made parties to this action or not, be determined and prorationed, and that any judgment that might be rendered against these answering Defendants, or any one of them, be reduced not only by that degree of contributory negligence and/or assumption of risk and/or product misuse or alteration found to exist as to Plaintiff, but also as to the total of that degree of negligence and/or fault found to exist as to said other persons or companies.

FIFTH AFFIRMATIVE DEFENSE

6. That Plaintiff's second amended complaint herein, and all purported causes of action directed to these answering Defendants, are barred pursuant to Statute of Limitations set forth in *C.C.P.* Section 340(3).

SIXTH AFFIRMATIVE DEFENSE

7. That each cause of action alleged against these answering Defendants violates Article 1, Sections 1 and 4, of the Constitution of the State of California, and violates the First Amendment to the Constitution of the United States of America.

SEVENTH AFFIRMATIVE DEFENSE

8. That the first cause of action fails to state a cause of action against these Defendants in that the demurrer of these Defendants to said cause of action was sustained on October 23, 1981, Plaintiff given thirty days to amend in which time Plaintiff did not amend said second amended complaint.

EIGHTH AFFIRMATIVE DEFENSE

9. That the second cause of action fails to state a cause of action against these Defendants in that the demurrer of these Defendants to said cause of action was sustained on October 23, 1981, Plaintiff given thirty days to amend in which time Plaintiff did not amend said second amended complaint.

NINTH AFFIRMATIVE DEFENSE

10. That the fifth cause of action fails to state a cause of action against these Defendants in that the demurrer of these Defendants to said cause of action was sustained on October 23, 1981, Plaintiff given thirty days to amend in which time Plaintiff did not amend said second amended complaint.

TENTH AFFIRMATIVE DEFENSE

11. That the sixth cause of action fails to state a cause of action against these Defendants in that the demurrer of these Defendants to said cause of action was sustained on October 23, 1981, Plaintiff given thirty days to amend in which time Plaintiff did not amend said second amended complaint.

ELEVENTH AFFIRMATIVE DEFENSE

12. That the seventh cause of action fails to state a cause of action against these Defendants in that the demurrer of these Defendants to said cause of action was sustained on

October 23, 1981, Plaintiff given thirty days to amend in which time Plaintiff did not amend said second amended complaint.

TWELFTH AFFIRMATIVE DEFENSE

13. That the eighth cause of action fails to state a cause of action against these Defendants in that the demurrer of these Defendants to said cause of action was sustained on October 23, 1981, Plaintiff given thirty days to amend in which time Plaintiff did not amend said second amended complaint.

WHEREFORE, Defendants, and each of them, prays for judgment as follows:

1. That Plaintiff take nothing;

2. That Defendants, and each of them, be awarded their costs and expenses incurred herein; and,

3. For such other and further relief as the Court deems just and proper.

Dated: December 9, 1981

THOMAS & PRICE

By: /s/ LAWRENCE E. PRICE

Attorneys for Defendants, Sinai Temple, a non-profit corporation, William Friedland, Milton Siegel, Doris Siegel, and Mount Sinai Memorial Park, a subsidiary of Defendant, Sinai Temple

Office - Supreme Court, U.S.
FILED
AUG 18 1982
ALEXANDER

No. 82-96
IN THE

Supreme Court of the United States

October Term, 1982

SINAI TEMPLE, a nonprofit religious corporation, WILLIAM FRIEDLAND, MILTON SIEGEL, DORIS SIEGEL, and MOUNT SINAI MEMORIAL PARK, a division of SINAI TEMPLE,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

ARTHUR D. RUTLEDGE,
3701 Wilshire Boulevard,
Suite 400,
Los Angeles, Calif. 90010,
(213) 381-2600,
Attorney for Real Party in Interest, Marvin Smotrich.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

	Page
Opinion Below	2
Statement of the Case	2
Statement of Reasons for Denying the Writ of Certiorari	3
I.	
The Discovery Sought Is Not Barred by the First Amendment's Freedom of Religion Clause	3
Conclusion	6

TABLE OF AUTHORITIES CITED

Cases

Braunfield v. Brown, 366 U.S. 599 (1961)	4
Cantwell v. Connecticut, 310 U.S. 296 (1940)	3, 6
General Counsel on Finance and Administration of the United Methodist Church v. Superior Court, 439 U.S. 1355 (1978)	4, 5

Constitution

United States Constitution, First Amendment	3, 4, 5, 6

No. 82-96

IN THE

Supreme Court of the United States

October Term, 1982

SINAI TEMPLE, a nonprofit religious corporation, WILLIAM FRIEDLAND, MILTON SIEGEL, DORIS SIEGEL, and MOUNT SINAI MEMORIAL PARK, a division of SINAI TEMPLE,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

Real Party in Interest, Marvin Smotrich, hereby respectfully opposes Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, filed by petitioners herein, and respectfully request that said petition be denied. The Court of Appeal of the State of California, Second Appellate District, denied petitioners' Petition for Writ of Mandate directed to Respondent Court, and the Supreme Court of California denied a Petition for Hearing.

Opinion Below.

The Court of Appeal opinion is set forth in Appendix A of the Petition for Writ of Certiorari and is referred to as if set forth in full herein. The Supreme Court of California denied a Petition for Hearing and rendered no opinion. The Respondent Court, in its decision upon which the Petition for Writ of Mandate was based, rendered an unreported minute order which is set forth in Appendix B of the Petition for Writ of Certiorari and is referred to as if set forth in full herein.

Statement of the Case.

Real Party in Interest hereby accepts and adopts the Statement of the Case as set forth in the Petition for Writ of Certiorari and incorporates the same by reference as though set forth in full herein.

STATEMENT OF REASONS FOR DENYING THE WRIT OF CERTIORARI.

I.

The Discovery Sought Is Not Barred by the First Amendment's Freedom of Religion Clause.

The lawsuit brought by Real Party is based upon tortious and wrongful conduct without reference to considerations of faith, belief or church tenets. The Second Amended Complaint, as set forth in Appendix E of the Petition for Writ of Certiorari and is referred to as if set forth in full herein, contains allegations of wrongdoing on the part of both petitioners and Hillel Silverman, petitioners' employee and agent.

None of the twenty requests for admissions and interrogatories violates petitioners' constitutional right to freedom of religion. The First Amendment's freedom of religion guaranty does not provide petitioners with an all-encompassing blanket of protection against liability for their tortious and wrongful conduct. Activities conducted by a religious organization are frequently subject to civil court jurisdiction, particularly when the wrongful conduct alleged is tortious in nature.

If the protection of third parties and the public is at issue, such protection itself outweighs any claim to First Amendment protection. It has been said that the freedom of religion guaranty cannot be used to thwart a state's legitimate police power and may not be used to escape liability to innocent third parties or to the public. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court stated that a religious organization may not, with impunity, commit frauds upon the public and conduct remains subject to regulation for the protection of society. *Id.* at 303-304, 306.

In *Braunfield v. Brown*, 366 U.S. 599 (1961), the Court upheld a Pennsylvania criminal statute which prescribed the Sunday retail sale of certain goods, rejecting the petitioner's argument that the law violated the First Amendment's guaranty of freedom of religion, stating that:

> "However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. Cantwell v. State of Connecticut, supra, 310 U.S. at pages 303-304, 306, 60 S.Ct. at pages 903-904. As pointed out in Reynolds v. United States, supra, 98 U.S. at page 164, legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, . . ." *Id.* at 603.

In *General Counsel on Finance and Administration of the United Methodist Church v. Superior Court*, 439 U.S. 1355 (1978), the applicant applied for a temporary stay of proceedings in the Superior Court of the State of California for the County of San Diego in which it was a defendant in a class action suit for fraud, breach of contract and other wrongful conduct. The Superior Court had denied the applicant's motion to quash service of process for lack of personal jurisdiction and the applicant applied for a temporary stay, contending that the Superior Court's action violated its First Amendment guaranty of freedom of religion. Justice Rehnquist, in denying the application for temporary stay, stated that:

> "In my view, applicant is plainly wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may

inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating interchurch disputes. See *Serbian Eastern Orthodox Diocese v. Milivojevich*. This Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular, doctrinal beliefs. 426 U.S. at 709-710, 96 S.Ct. at 2380-2381. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization, in which fraud, breach of contract, and statutory violations are alleged. As the Court stated in another context: 'Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.' Cantwell v. Connecticut, 310 U.S. 296, 306, 60 S.Ct. 900, 904, 84 Lawyers Ed. 1213 (1940)." *Id.* at 1372-1373.

In light of the foregoing, it is clear that none of the requests for admission or interrogatories violate petitioners' First Amendment rights. Each of the questions and requests relate to Hillel Silverman's *secular* capacity as a marriage counselor and petitioners' knowledge of activities conducted by Hillel Silverman in his capacity as a marriage counselor. The sought-after discovery is relevant to prove or disprove the allegations contained in the Second Amended Complaint as it relates to the causes of action for negligence, fraud and other wrongful conduct. No inquiry is being directed into the petitioners' religious functions. The only discovery is directed to a purely secular function performed by one of

the petitioner's employees acting in a secular capacity. Real Party is not attempting to question "who shall preach from the pulpit" because the lawsuit surrounds non-rabbinical functions, namely, functions relating solely to marriage counseling. The area of inquiry should be allowed to protect innocent third parties from fraudulent and wrongful conduct committed by a religious organization. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Conclusion.

Because the information requested is not protected by the First Amendment, Real Party respectfully requests that the Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, be denied. The order was not unconstitutional and was not an abuse of discretion.

Respectfully submitted,

ARTHUR D. RUTLEDGE,

Attorney for Real Party in Interest.